

JULITA TINGGAL v. KWAN AH HEE (DECEASED) & ORSHIGH COURT SABAH & SARAWAK, KOTA KINABALU
SUPANG LIAN J[JUDICIAL REVIEW NO: BKI-13NCVC-17-10-2017 (HC2)]
1 AUGUST 2019

JURISDICTION: *Courts – Powers and jurisdiction – Native Court of Appeal ('NCA') – Composition of – Three member panel comprising of one High Court Judge and two other members being District Chiefs or Native Chiefs – Whether all three members on equal footing to make decisions – Whether mandatory for NCA to deliver judgment based on majority decision – Whether minority decision of presiding High Court Judge could take priority over majority decision of Native Chiefs – Sabah Native Courts Enactment 1992, ss. 5 & 24*

In September 1979, the second and third respondents ('respondents') applied to the District Native Court at Kota Kinabalu ('DNC') to be declared as natives of Sabah under s. 3(2) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64). On 5 September 1979, the DNC allowed their application. Hence, for the past 38 years, the respondents had regulated their affairs consonant with the native certificates, including the purchase of native title lands. Amongst others, the respondents had, in 1992, purchased 46 parcels of native title lands from 46 landowners, which they occupied and developed into an oil palm plantation. However, in 2001, when the titles to the lands were issued to the landowners, unknown to the respondents, the landowners again sold the lands to a third party and the third party subsequently sold the land to a non-native, Vun Yun Lau, who caused them to be registered in the name of his sister-in-law, the applicant. Sometime in 2005, the applicant sold the lands to one Hiew Kon Fah who commenced an action against the respondents at the High Court to recover possession of the land. Hiew Kon Fah challenged the validity of the respondents' status as natives and raised the issue of illegality on the purchase of the lands as they were native lands. It was alleged that the respondents were not entitled to the native certificates and therefore, not entitled to purchase the lands. The High Court dismissed the applicant's claim ruling that it was not the proper forum to determine any challenge against the native certificates since such jurisdiction belonged exclusively to the native court and dealt with the other issues on the rightful ownership of the lands. The High Court dismissed the applicant's claim and allowed the second and third respondent's counterclaim. Following the High Court judgment, the applicant applied to the DNC under s. 16(1) of the Sabah Native Courts Enactment 1992 ('NCE 1992') to revise the decision of the DNC issuing the native certificates. The DNC decided that the native certificates were forged and invalid and ordered them to be surrendered and destroyed. The respondents thus appealed to the Native Court of Appeal ('NCA'), comprising of Judicial Commissioner of the High Court ('JC') and two Native Chiefs. The two

- A Native Chiefs gave concurring decision in dismissing the appeal and held that: (i) the DNC has the jurisdiction to review proceedings of every Native Court so as to satisfy itself as to the correctness, legality or propriety of any order recorded and as to the regularity of proceedings of Native Court as per s. 16 of the NCE 1992; and (ii) the authenticity of the alleged native
- B certificates were highly doubtful and were therefore deemed fake and/or irregular. However, the JC, in a dissenting judgment, allowed the appeal and set aside the decision and order of the DNC and held: (i) the NCA, in dealing with a similar issue in another case, held that s. 16(1) of the NCE 1992 had no retrospective effect and hence, a similar approach should be taken;
- C (ii) since the appeal was decided purely on questions of law, the presiding judge was not required to seek the advice or assistance of the two other members of the NCA as the duty to decide on the issues of law must be left to the presiding judge alone; and (iii) the sole decision of the presiding judge should therefore become the judgment of the appeal as the matter before the court did not involve any matter relating to custom or adat. The dissenting
- D judgment of the JC was then recorded as the final decision of the appeal. Therefore, the applicant filed the application for judicial review and *certiorari* to quash the decision of the NCA. The issues for determination in this case were: (i) whether the NCA had erred in dismissing the majority judgment of two members of the NCA and holding the minority judgment as the final
- E judgment; and (ii) if the NCA was correct in holding the minority judgment as the final judgment, whether s. 16(1) of the NCE 1992 has retrospective effect.

Held (allowing application):

- F (1) Pursuant to the provisions of s. 5 of the NCE 1992, the NCA is established based on a three member panel comprising of a High Court Judge and two other members being District Chiefs or Native Chiefs as appointed by the Minister. The other two members of the NCA are not designated as assessors sitting with the High Court Judge. Instead, they
- G are described as members of the NCA and therefore, the three members of the NCA are on equal footing when it comes to making decisions. (para 22)
- H (2) According to the ordinary plain meaning of s. 24 of the NCE 1992, the NCA shall come to a unanimous or a majority decision. The NCE 1992 does not provide for additional powers to the President or presiding judge of the NCA to dismiss or ignore the majority findings of the court on the grounds that the appeal is to be decided solely on a question of law and does not involve custom or adat. It was mandatory for the NCA to deliver judgment based on the majority decision of the members. The
- I NCA had thus erred in law in dismissing the majority decision of the two District Chiefs and in imposing the dissenting minority judgment of the presiding High Court Judge as the final judgment of the appeal. (paras 24-26 & 29)

(3) In the circumstances, there was no necessity to consider the remaining issue and arguments raised by the respondents. The court thus granted an order of *certiorari* to quash the minority decision of the JC allowing the appeal and granted a declaration that the majority decision of the NCA by the other two members to be taken and recorded as the final decision of the NCA. (paras 30 & 31)

Case(s) referred to:

Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC (*refd*)
Madlis Azid v. Board of Officers & Ors [2015] 3 CLJ 168 CA (*refd*)
Ng Aun Say & Sons Realty Sdn Bhd v. Magnasari Sdn Bhd & Ors And Another Appeal [2013] 8 CLJ 814 CA (*refd*)
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC (*dist*)
The Sussex Peerage Case (1844) 11 CI & Fin 85 (*refd*)
Ungkari Ikus v. Hon Chung Lip (Case No: BKI-47-10-12-2015) (Unreported) (refd)

Legislation referred to:

Courts of Judicature Act 1964, ss. 41, 77
 Federal Constitution, art. 121(1)
 Interpretation (Definition of Native) Ordinance (Sabah)(Cap 64), s. 3(2)
 Land Acquisition Act 1960, s. 40D
 Native Courts Enactment 1992 (Sabah), ss. 5, 16(1), 23, 24

For the applicant - Ansari Abdullah; M/s Ansari & Co
For the 2nd & 3rd respondents - Raymond Szetu & Rebecca Thong; M/s Szetu & Co
For the 4th respondent - Dayangku Fazidah Bagul; Senior State Counsel, Sabah

Reported by S Barathi

JUDGMENT

Supang Lian J:

Introduction

[1] Before me is the application of Julita binti Tinggal, the applicant, for judicial review and *certiorari* to quash the decision of the Native Court of Appeal allowing the second and third respondents' appeal against the decision of the District Native Court sitting at Kota Kinabalu invalidating the native certificates of the second and third respondents.

Background Facts

[2] In September 1979, the second and third respondents ("the respondents") applied to the Native Court in Kota Kinabalu to be declared as natives of Sabah under s. 3(2) of the Interpretation (Definition of Native) Ordinance, 1952 (Sabah Cap. 64). On 5 September 1979, the native court allowed their application and declared them as natives of Sabah under s. 3(2). The two declarations that the respondents are natives of Sabah

- A were also duly scrutinised as correct by the District Officer. The native court which made the declarations and issued the native certificates were constituted under and governed by the then Native Courts Ordinance, 1953 (Sabah Cap. 86) which was repealed in 1992 by the Native Courts Enactment, 1992 (hereinafter referred to as “the 1992 Enactment”).
- B [3] Following the issuance of the native certificates, the respondents for the past 38 years have regulated their affairs consonant with the native certificates, including the purchase of native title lands as natives of Sabah. Amongst others, the respondents had in 1992 purchased 46 parcels of native title lands from 46 landowners subsequent to the approval of their land applications but, pending the issuance of titles by the land office. Moreover,
- C after they had bought the lands, the respondents occupied the lands and spent about nine years to develop them into an oil palm plantation.
- D [4] However in 2001, when the titles to the lands were issued to the landowners, unknown to the respondents, the landowners again sold the lands to a third party, namely, Abdul Hamid Duli who became the registered proprietor. Abdul Hamid Duli then sold the lands to a non-native called Vun Yun Lau @ Vun Yun Liew Tony who caused them to be registered in the name of his sister-in-law, the applicant.
- E [5] Sometime in 2005, the applicant sold the lands to one Hiew Kon Fah who then claiming to be the registered owner of the lands, commenced an action in the Sandakan High Court in Suit No. S22-27 of 2005 against the respondents to recover possession of the lands. In the High Court suit, Hiew Kon Fah challenged the validity of the Kwan brothers’ status as natives and raised the issue of illegality on the purchase of the lands as they are native
- F lands. It was alleged that the respondents were not entitled to the native certificates and therefore not entitled to purchase the lands. The respondents on the other hand alleged that they have bought the lands from another party who claimed to be the representative of the landowners. They also filed a counterclaim against Hiew Kon Fah and others.
- G [6] On 28 October 2011, the High Court ruled that it was not the proper forum to determine any challenge against the native certificates since such jurisdiction belonged exclusively to the native court and dealt with the other issues on the rightful ownership of the lands. The High Court dismissed the applicant’s claim and allowed the second and third respondents’
- H counterclaim. The applicant and other aggrieved parties had filed an appeal against the High Court decision to the Court of Appeal.
- I [7] Following the High Court judgment, the applicant on 27 March 2012 applied to the District Native Court at Kota Kinabalu (the “DNC”) under s. 16(1) of the 1992 Enactment, to revise the decision of the native court made on 12 May 1981 issuing the native certificates. On 10 May 2016, the DNC decided that the native certificates were forged and invalid and ordered them to be surrendered and destroyed.

Appeal To The Native Court Of Appeal

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[8] The respondents were of course unhappy with the decision of the DNC and an appeal to the Native Court of Appeal (“NCA”) was filed on 12 May 2016. The NCA comprised of Judicial Commissioner of the High Court Justice Ismail Brahim, Matsah bin Sahat (Ketua Anak Negeri) and Awang Hanip bin Kassim (Ketua Anak Negeri).

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[9] On 14 July 2017, after considering the submissions of all parties, the court delivered its decision. Two members of the court, namely, Matsah bin Sahat and Awang Hanip bin Kassim gave concurring written decisions and held as follows:

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- (i) the District Native Court has jurisdiction to review proceedings of every native court so as to satisfy itself as to the correctness, legality or propriety of any order recorded and as to the regularity of proceedings of native court as per s. 16 of the Sabah Native Courts Enactment 1992;
- (ii) the authenticity of the alleged native certificates are highly doubtful based on the evidence tendered by the applicant (respondent in the appeal) and therefore deemed fake and/or irregular; and
- (iii) the appeal filed by the second and third respondents is therefore dismissed.

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[10] Justice Ismail Brahim, however, in a dissenting judgment which he pronounced in open court, held as follows:

- (i) the Native Court of Appeal has dealt with similar issues in *Ungkari Ikus v. Hon Chung Lip* (Case No: BKI-47-10-12-2015) whereby it was held that s. 16(1) of the Native Courts Enactment 1992 has no retrospective effect. Hence, a similar approach should be taken;
- (ii) since the appeal is decided purely on questions of law, the presiding judge is not required to seek the advice or assistance of the other two members of the Native Court of Appeal, as the duty to decide on the issues of law must be left to the presiding judge alone;
- (iii) the sole decision of the presiding judge should therefore become the judgment of the appeal as the matter before the court does not involve any matter relating to custom or adat; and
- (iv) in the circumstances, the appeal is allowed and the decision and order of the DNC set aside.

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[11] Pursuant to that, the dissenting judgment of Justice Ismail Brahim was then recorded as the final decision of the appeal.

[12] This led to the filing of the present application for judicial review. The reliefs sought are:

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- A (i) To quash the Native Court of Appeal's decision, which the applicant claimed to be the minority dissenting decision of the presiding judge of the Native Court of Appeal, Justice Ismail bin Brahim;
- (ii) To declare that the decisions of the other two members of the Native Court of Appeal (the majority), namely Matsah bin Sahat and Awang Hanip bin Kassim, in dismissing the respondents' appeal, as the decision of the Native Court of Appeal; and
- B (iii) Such further orders as may be made or deemed just by this court.

Issues For Determination

- C [13] The issues before this court are:
- (i) Whether the NCA has erred in dismissing the majority judgment of two members of the NCA and holding the minority judgment as the final judgment; and
- D (ii) If the NCA was correct in holding the minority judgment as the final judgment, whether s. 16(1) of the NCE 1992 has retrospective effect.

First Issue: Whether The NCA Had Erred In Holding The Minority Judgment As The Final Judgment?

E Arguments Of The Applicant

- [14] Learned counsel for the applicant stated that the sole ground for seeking judicial review is that the decision of the presiding High Court Judge, Justice Ismail Brahim, was a dissenting judgment. In taking the dissenting judgment of Justice Ismail Brahim as the final judgment of the Native Court of Appeal whilst ignoring the majority decision of the other two members of the panel namely, Matsah bin Sahat (Ketua Anak Negeri) and Awang Hanip Bin Kassim (Ketua Anak Negeri), the NCA had acted in contradiction to the very statute from which it derived its authority ie, the NCE 1992.
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- G [15] Counsel argued that under s. 23 NCE 1992, the NCA comprises of a High Court Judge and two other District Chiefs. In delivering its judgment, s. 24 NCE 1992 stipulates that the NCA shall decide on a unanimous or that of majority of its members. Counsel submitted that s. 24 should be given its plain meaning based on the Court of Appeal decision in *Madlis Azid v. Board of Officers & Ors* [2015] 3 CLJ 168. Section 24 echoes s. 41 and s. 77 of the Courts of Judicature Act 1964 ("CJA") whereby proceedings shall be decided on a unanimous decision or based on the opinion of the majority of judges composing the court.
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- [16] The NCA had acted in contradiction to the plain language of s. 24 by dismissing the majority decision of its panel and holding the minority decision as final judgment. Given the word "shall" in s. 24, by law, it is mandatory for the NCA to deliver judgment based on its members' majority decision.
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[17] The NCE 1992 does not grant any additional powers to the High Court Judge against that of the other two members of the NCA. Though the High Court Judge would generally be viewed as being a person of higher position in the civil courts, that designation must be distinguished from that of the native courts as the latter is a special court established specifically under Sabah's Native Courts Enactment 1992 to administer Sabah native matters.

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[18] The majority decision of Matsah bin Sahat and Awang Hanip bin Kassim are of equal footing with that of Justice Ismail Brahim. Hence, the 2 – 1 majority decision in dismissing the appeal ought to be enshrined as the final judgment of the appeal. This is consistent with the ordinary and plain meaning of s. 24 NCE 1992 and within the same spirit as that of the other appellate courts of Malaysia as well as common law and civil law.

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Arguments Of The Respondents

[19] Learned counsel for the respondents submitted that notwithstanding the express language of s. 24 of the 1992 Enactment, in so far as the section purports to grant judicial powers to the other lay members of the Native Court of Appeal appointed by the Minister to be the final arbiters of the appeal, such powers are *ultra vires* art. 121(1) of the Federal Constitution. In support, counsel relied on the recent decision of the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561.

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[20] The *Semenyih Jaya* case concerned s. 40D of the Land Acquisition Act 1960 where the two assessors sitting with the High Court Judge are the final arbiters on the amount of compensation payable and not the judge. Section 40D expressly imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of them if their decisions differ. The Federal Court's response to the above imposition on the judge's power are:

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(i) "only judges as appointed under art. 122B of the Federal Constitution and no other, can exercise decision making powers in our courts";

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(ii) "... the judicial power of the court resides in the Judiciary and no other as is explicit in art. 121(1) of the Constitution";

(iii) "We are of the view that the discharge of judicial power by non-qualified persons (and not by judges or judicial officers) or non-judicial personages render the said exercise *ultra vires* art 121 of the Federal Constitution";

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(iv) "It is reiterated that the opinion of the assessors are not binding on the judge. ... Should the judge finds himself in disagreement with the opinion of both the assessors, he is at liberty to decide the matter, giving his reasons for so doing" and

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(v) "For all the reasons above, we find s. 40D to be *ultra vires* the Federal Constitution and that it should be struck down".

A [21] Based on the above Federal Court decision, the respondents submitted, the decision of the NCA must now be that of the presiding High Court Judge to allow the respondents' appeal against the decision of the District Native Court.

This Court's Decision

B [22] Pursuant to the provisions of s. 5 NCE 1992, the NCA is established based on a three member panel comprising of a High Court Judge and two other members being District Chiefs or Native Chiefs as appointed by the Minister. Unlike the provisions of the repealed Sabah Native Courts Ordinance and s. 40D of the Land Acquisition Act 1960 which was
C considered in *Semenyih Jaya, supra*, the other two members of the NCA are not designated as assessors sitting with the High Court Judge. Instead, they are described as members of the NCA. In my opinion, the three members of the NCA are on equal footing when it comes to making decisions. The other two members hold the same authority and judicial weight as that of the
D High Court Judge.

[23] I feel fortified in my opinion given the wordings of s. 24 NCE 1992 which dictate that such appellate court (be it the District Native Court or the Native Court of Appeal) shall decide on a unanimous or that of majority of
E its members. It is well-established law that the interpretation of statutes should be made generally on its literal façade unless such approach would lead to absurdity or ambiguity: see *The Sussex Peerage Case* (1844) 11 CI & Fin 85; *Ng Aun Say & Sons Realty Sdn Bhd v. Magnasari Sdn Bhd & Ors And Another Appeal* [2013] 8 CLJ 814 and *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445.

F [24] According to the ordinary plain meaning of s. 24 NCE 1992, the NCA shall come to a unanimous or a majority decision. To my mind, there is nothing ambiguous about this. Neither does it leads to absurdity. The term "majority" is described by the *New Shorter Oxford English Dictionary* vol. 1 (1993 edn) as:
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The state or fact of being greater; superiority; pre-eminence ... the greater number or part; a number which is more than half the whole number;..."

H [25] I respectfully agree with counsel for the applicant that the NCA in the present case had acted contrary to the plain language of s. 24 NCE 1992 in dismissing the majority decision of the two members of the panel. In my view, by law, it is mandatory for the NCA to deliver judgment based on the majority decision of the members.

I [26] I also respectfully agree that the NCE 1992 does not provide for additional powers to the President or presiding judge of the NCA to dismiss or ignore the majority findings of the other two members of the court on grounds that the appeal is to be decided solely on a question of law and does

not involve custom or adat. In my opinion, a High Court Judge sitting in the NCA which is a special court established under the Sabah Native Courts Enactment 1992 to administer native matters, stands on equal footing as the other members and has no powers to dismiss or ignore the findings of the majority.

[27] I do agree with counsel for the applicant that the NCA, in exercising its appellate powers, should act in accordance with the law and in the same spirit as the other appellate courts of the Federation. For instance, similar provisions exist in the Courts of Judicature Act 1964 for the Court of Appeal and the Federal Court to decide cases by unanimous decision or based on the opinion of the majority of the judges comprising the court. For the Court of Appeal it is s. 41 whereas it is s. 77 for the Federal Court. In my view, the NCA is no different.

[28] For the reasons given above, the decisions of Matsah bin Sahat and Awang Hanip bin Kassim both of whom are Ketua Anak Negeri are on equal footing with that made by Justice Ismail Brahim. *Ergo*, the 2-1 majority decision dismissing the appeal ought to be taken as the final judgment of the appeal consistent with the ordinary and plain meaning of s. 24 NCE.

[29] With all due respect, I find and hold that the NCA had erred in law in dismissing the majority decision of the two District Chiefs and in imposing the dissenting minority judgment of the presiding High Court Judge as the final judgment of the appeal. The minority decision that was recorded as the final judgment ought to be quashed and substituted with the majority decision of the members of the NCA.

Second Issue: Whether s. 16(1) Of The NCE 1992 Has Retrospective Effect?

[30] In view that this application would be effectively disposed of by the determination of the first issue, there was no necessity to consider the remaining issue and arguments raised by the respondents.

Conclusion

[31] Following from what has been stated above, I ordered as follows:

- (i) there would be an order of *certiorari* to quash the minority dissenting decision of Justice Ismail Brahim in allowing the appeal No. BKI-47-5/5-2016;
- (ii) a declaration that the majority decision of the NCA by the other two members Matsah bin Sahat and Awang Hanip bin Kassim dismissing the appeal be taken and recorded as the final decision of the NCA; and
- (iii) costs of the application to the applicant in the sum of RM15,000 as against the second and third respondents.